Burns International Security Services, Inc. *and* Power Plant Police and Security Officers, Local 1, Petitioner. Case 4-RC-14245

June 29, 1981

DECISION AND CERTIFICATION OF REPRESENTATIVE

The Board has considered objections to an election held August 7, 1980,[1] and the Acting Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, the Employer's motion for an order directing the Regional Director for Region 4 to transmit to the Board the complete investigative file, and its letter supplementing that motion.[2]

First we consider the question of which of the Employer's objections are properly before us. The Employer filed timely objections on August 14, 1980. These objections alleged four acts of union misconduct: (1) electionering and loud talking near the polls; (2) misrepresentation that selection of the Petitioner would guarantee certain benefits; (3) misuse of a Board document; and (4) improper waiver of initiation fees. Later, some 47 days after the election, the Employer filed "Supplementary Objections," alleging further misconduct which it claimed was newly discovered. The subjects of these late-filed objections were: (1) an alleged misrepresentation as to the contents of collective-bargaining agreements with other employers; (2) an alleged misrepresentation of provisions in the Petitioner's constitution; (3) a generalized contention that the Petitioner created the impression that the Board supported it; (4) an alleged misrepresentation regarding the Petitioner's policies on calling strikes; and (5)-(8) several allegations of facts which, according to the Employer, disqualify the Petitioner from certification regardless of the fairness of the election. A month later, 77 days after the election, the Employer filed a set of "Second Supplementary Objections." These objections repeated the generalized contentions of the creation of the impression that the Board favored the Petitioner in the election and alleged additional grounds for disqualifying the Petitioner from certification.

The Acting Regional Director accepted the Employer's Supplementary Objections and Second Supplementary Objections, although late-filed, because he read our decision in *American Safety Equipment Corporation*, 234 NLRB 501 (1978), as requiring him to do so. In *American Safety*, the Board restated its position with respect to a Regional Director's obligation in conducting investigations of timely filed objections. We held that it is within the Regional Director's discretion to determine the scope of the investigation but, "if he receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election." Here, the Acting Regional Director did not exercise his discretion to accept the late-filed objections, but felt constrained by the above-quoted langauge to consider them. Thus, he interpreted *American Safety* as establishing that the failure to file these objections within the time provided by the Board's Rules and Regulations can no longer serve as a basis for refusing to consider them. This is not what we intended. In *American Safety*, the Regional Director discovered unalleged misconduct in the course of his investigation and, *sua sponte*, properly set the election aside. Entertainment of a whole new set of objections, on the other hand, would vitiate our requirement that parties file timely objections. Being inundated with successive sets of objections, the Regional Director, if he had to investigate each new allegation, could be prevented from or unduly delayed in concluding his investigation.

The line between evidence discovered during the investigation and new, untimely objections will not always be glaringly clear. The difficulty lies in balancing the desirability of insuring that the election results truly reflect the free choice of the employees against the potential mischief inherent in permitting an objecting party to take control over the investigation away from the Regional Director.

The scheme of our objections procedure allows the losing party 5 working days after the results are tallied in which to discover the possibility of serious misconduct which might warrant setting the election aside and file objections. The objecting party is given a further, limited period of time in wich to complete its private investigation of that alleged misconduct and promptly turn results over to the Regional Director, who then investigates and takes appropriate action as expeditiously as thoroughness allows. The Regional Director's investigation is neither to be perfunctory nor, ordinarily, protracted. If material facts are in dispute the administrative investigation is suspended and

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 54 for, and 21 against, the Petitioner; there were no challenged ballots.

[2] In a further submission on the merits of the Employer's objections, the Employer would have the Board consider, as a basis for setting aside the election herein, the Union's informing employees that it has had *ex parte* communications with the Board. As this alleged misconduct occurred after the election the fairness of which we are here reviewing, it cannot constitute a basis for setting such election aside. Therefore, we find that the Employer's contentions with respect to this evidence are without merit.

the dispute is resolved through a hearing. But the scope of the investigation, as we made clear in *American Safety*, is within the informed discretion of the Regional Director. The investigation is in his or her hands; the period during which the investigation proceeds was never intended to provide more time for the objecting party to extend its own investigation in the hope of finding a basis for objection that lies beyond the matters covered in the Regional Director's investigation.

The objecting party may bring to the Regional Director's attention any newly-discovered evidence that bears directly on the timely objections, for such evidence is more apt to aid than to encumber him. The interest in insuring the employees were not coerced also warrants the Regional Director's consideration of unrelated misconduct, unknown to the objecting party at the time the objections were filed, the existence of which comes to its attention while the Regional Director is conducting his investigation. However, since consideration of such matters might enlarge the scope and delay the conclusion of the investigation, they normally should be considered only upon presentation of clear and convincing proof that they are not only newly discovered, but also, previously unavailable. We deem this limitation necessary in order to discourage both the piecemeal submission of evidence and the leisurely continuation of private investigations while the investigation should be under the control of the Regional Director.[3]

Applying these principles to the instant case, we find that none of the late-filed objections contain evidence bearing on the timely objections, and that although the Employer makes the bare assertion that they contain previously unavailable evidence, it has not demonstrated this. The Employer represents only that it discovered the evidence underlying its Second Supplementary Objections because of its continuing investigation. The only connections between the late and the timely objections are too remote to warrant their consideration as part of the Regional Director's investigation. thus, Supplementary Objections 1, 2, and 4 allege material misrepresentation, placing these objections in the same general category as timely Objection 2, but they refer to separate incidents that are dissimilar to those alleged in the timely objection. Supplementary Objection 3 and Second Supplementary Objection 1 refer to the same type of conduct as is alleged in timely Objection 3, but throw no light on the validity of the timely objection.[4]

Supplementary Objections 5, 6, 7, and 8 and Second Supplementary Objections 2, 3, and 4 are not objections to the conduct of the election at all. They are, as noted above, challenges to the qualification of the Petitioner to be certified by the Board. Such challenges are normally made before the election, since determination of that issue may forestall the holding of the election and the expenditure of the amounts of time and money that representation elections entail. Nevertheless, since challenges to the qualification of a labor organization may be made even after certification, we are constrained to entertain them at this intermediate stage.

In summary, we find that the Acting Regional Director properly considered on the merits the Employer's timely Objections 1-4, Supplementary Objections 5-8, and Second Supplementary Objections 2-4. As the Employer has excepted to the Acting Regional Director's recommendation that all these objections be overruled, they are before us on the merits. We dismiss Supplementary Objections 1-4 and Second Supplementary Objection 1 as untimely.

The Employer has moved for transmittal of the Regional Director's investigative file. The evidence needed to resolve the merits of the timely objections and the necessity of a hearing is before the Board. Similarly, the evidence needed to resolve the challenges to the Petitioner's qualification, which do not constitute election objections, is before the Board. This evidence is before the Board because the Employer has submitted it to us with its exceptions. Consequently, we need not rule on the Employer's motion.

The Acting Regional Director, in considering each of the timely objections and the challenges to the Petitioner's qualification, accepted the evidence submitted in support of the Employer's contentions at face value and, analyzing that evidence in the light of undisputed physical facts, decided that none of it established a basis for setting the election aside or disqualifying the Petitioner. In some instances, the Acting Regional Director relied secondarily on other evidence, obtained during the investigation, as providing an additional ground for

[3] We expect that previously unavailable evidence, when truly ecountered, usually will have come to the objecting party's attention unsolicited, not through a continuation of its own investigation.

[4] Timely Objection 3 alleges that the Employer found a Board brochure, into which a piece of the Petitioner's campaign literature had been inserted, at various employee work places on the day before the election. Supplementary Objection 3 and Second Supplementary Objection 1 both allege that "at various times during the course of the representation election campaign," the Petitioner created the impression that the Board supported the Petitioner in its organizing and campaign efforts. In attempting to substantiate these later versions of the objection, the Employer submitted no additional evidence of conduct occurring within the critical period—after the date on which the instant petition was filed. Therefore, the question of whether the late-filed objections alleging creation of the impression of Board favoritism are properly before us is largely academic. We shall consider only the evidence presented in support of the original objection.

overruling an objection. Thus, in disposing of Objection 4, relating to an alleged improper waiver of initiation fees, the Acting Regional Director found the Employer's evidence, even if accepted as true, insufficient to demonstrate any impropriety attributable to the Petitioner, but added that it appeared the Petitioner affirmatively informed employees that the waiver of initiation fees and dues was not contingent on the signing of authorization cards.

After reviewing all of the evidence the Employer submitted to the Acting Regional Director and to us, we agree with the Acting Regional Director's disposition of the matters before us, adopt his findings, the relevant portions of which are attached as a Appendix, and find that the Employer has not raised any issues requiring a hearing. Since everything essential to our review of the question of whether the Employer has made a *prima facie* case for setting aside the election is before us, the proper interpretation of Section 102.(g) of the Board's Rules and Regulations is not an issue here. The Sixth Circuit and we agree on this principle. See *Reichart Furniture Company* v. *N.L.R.B.*, 107 LRRM 2552 (6th Cir. 1981); *N.L.R.B.* v. *Curtis Noll Corporation Curtis Industries Division*, 634 F.2d 1027 (1980). But even to the extent that we rely, as the Acting Regional Director did, on his investigative findings based on evidence that is not before us, we act within the principles adopted by the courts. For we need not review those factual findings of the Acting Regional Director that are not in dispute, and none is in dispute. Those findings do not conflict with the evidence the Employer has proffered but help to place it in a context proper for examining its significance. In order to demonstrate that factual issues exist, the party excepting to the Regional Director's finding "must show what evidence will be presented to support a contrary finding." *Reichart Furniture Company* v. *N.L.R.B., supra*. This the Employer has not done.[5]

Finally, because the Employer has not made a *prima facie* showing in connection with any of its timely objections, or demonstrated that material factual issues exist as to the correctness of the Acting Regional Director's findings, we reject the Employer's contention that the Acting Regional Director's investigation was inadequate. that contention is supported by nothing except speculation as to what an "adequate" investigation might have produced. While the Regional Director must conscientiously attempt to ascertain whether alleged objectional conduct really occurred, it is, as *American Safety* reaffirms, within his discretion not "to seek out [additional] evidence that would warrant setting aside the election." *N.L.R.B.* v. *Singleton Packing Corp.*, 418 F.2d 275, 280 (5th Cir. 1969).

Accordingly, we shall certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Power Plant Police and Security Officers, Local 1, and that Pursuant to Section 9(a) of the National Labor Relations Act, as amended, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> Included: All full-time and regular part-time guards employed by the Employer at the Philadelphia Electric Company Peachbottom Atomic Power Station, R.D. #1, Delta, Pa.
>
> Excluded: All other employees, office clerical employees, shift sergeants and supervisors and professionals as defined in the Act.

APPENDIX

Objection 1

In this Objection, the Employer contends that there were two separate violations of the Board's rule established in *Milchem*, 170 NLRB 362, regarding discussions with voters waiting to cast ballots. The election was conducted in a conference room in the rear of a fire hall. The entrance to the room was about 45 feet from the doors. The Objection states that a group of employees were gathered approximately 15 yards from the front door entrance to the fire hall during the morning voting session. Thus, these employees were approximately 90 feet from the actual polling area and were not within sight of the polling area. The Employer does not assert that these employees were acting as agents of the Petitioner or that any of them made remarks to employees waiting in line to vote or in the polling area itself. There was no evidence that any of the employees outside of the fire hall were electioneering or that they made any coercive statements. Accordingly, I find that the presence of voters outside the polls did not interfere with the employee's freedom of choice and is not a basis for setting aside the election. *Stephenson Equipment Company*, 174 NLRB 865, 867.

The Employer also alleges that during the afternoon session Herman Jaffe, business representative of the Petitioner, engaged in conversations with voters at the front door of the fire hall which, as noted previously, was about 45 feet from the entrance of the conference room

[5] Because we assume the truth of the Employer's factual presentations, and find that they do not raise a substantial or material issue requiring a hearing, our action is consonant with the decision in *Anchor Inns, Inc. d/b/a Anchor Inn Hotel of St. Croix* v. *N.L.R.B.*, 106 LRRM 2860, 90 LC ¶12,658 (3d Cir. 1981), cited by the Employer in support of the contention that a hearing is necessary. There, the court criticized the Board for refusing a hearing without assuming the truth of the evidentiary facts set forth in the objections.

in which the voting was being conducted. The line of voters never extended outside the conference room and the voting area was set up so that the table, ballot box, and booth were out of sight of the main area of the first floor of the fire hall where the fire company's trucks were parked. There was no evidence presented as to the subject matter of any conversations which occurred. The Board Agent conducting the election did not establish a no-electioneering area. As any remarks Jaffe may have made were not directed to prospective voters in the polling area or in line waiting to vote and were not in contravention of any establish no-electioneering area, I find the alleged conduct of Jaffe does not constitute a basis of for setting aside the election. Accordingly, I find that Objection 1 lacks merit. *Harold W. Moore & Son*, 173 NLRB 1258; *Marvil International Security Service*, 173 NLRB 1260.

Objection 2

In this Objection, the Employer contends that the Petitioner made gross misrepresentations in a letter, attached hereto as Appendix 1, at a time which did not provide the Employer with an adequate opportunity to respond. The letter, allegedly distributed on August 5, 1980, does not constitute a basis for setting aside the election. While it does contain representations that the employees will have certain benefits in the event they select the Petitioner as their collective bargaining representative, the Board has long held that employees understand that a union cannot obtain increased wages and benefits just by winning an election, but that benefits must be obtained through collective-bargaining. *The Smith Company*, 192 NLRB 1098. Moreover, in a letter dated June 12, 1980, which was distributed by the Employer, in response to an alleged Union statement that "a union means more money and benefits for you," the Employer stated, "Burns can only get for you what the client is able to give—union or no." Accordingly, I find that the employees were able to evaluate the statements in the August 5 letter, and that Objection 2 lacks merit.

Objection 3

[In this Objection] they alleged misuse of Board material by the Petitioner during the campaign so as to create an impression that the Board was aligning itself with or endorsing Petitioner's campaign. The cartoon attached hereto as Appendix 2 was allegedly distributed to employees inside the Board's publication "Your Government Conducts An Election" on August 6, 1980. This piece of campaign propaganda could not reasonably have been construed by employees to have been a part of the Board leaflet as it made no reference to the Board and it was clearly headed "Federation of Special Police and Law Enforcement Officers" with the offices and telephone numbers of that organization. Furthermore, the Board's publication sets forth employee rights, conduct which may not be engaged in by a union as well as that prohibited by an employer, and a statement that the Board does not endorse any choice in the election. Accordingly, I find that this alleged distribution did not interfere with the employees' freedom of choice and is not a basis for setting aside the election. *Hall-Brooke Hospital, a Division of Hall-Brooke Foundation, Inc.*, 244 NLRB 91.

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Objection 4

In this Objection, the Employer contends that the Petitioner improperly waived initiation fees and dues in order to induce employees to sign authorization cards. In support of this Objection, the Employer presented only hearsay evidence that one employee told another employee that the second employee should sign a union authorization card in order to escape the union dues and initiation fee payment which she would otherwise have to pay later. The Employer presented no evidence that the employee who made the settlement about waiver of initiation fees and dues was an agent of the Petitioner. Further, there was no evidence that the Petitioner knew of, authorized, or condoned any such statements that may have been made. Moreover, the investigation disclosed that on numerous occasions, the Petitioner told employees that initiation fees had been waived because all employees would be charter members with this Employer, and never indicated that this waiver was in any way contingent upon the employees' signing Union authorization cards. Accordingly, I find that Objection 4 lacks merits. *Allied Metal Hose, Inc.*, 219 NLRB 1135; *Firestone Steel Products Co.*, 235 NLRB 548; cf. *Savair Mfg. Co.*, 414 U.S. 270.

Supplementary Objection No. 5

In this Objection, the Employer contends that the Petitioner is disqualified from representing employees because of its "inability to act with the single-minded purpose of protecting and advancing employee interest instead of the interests of certain individuals." The facts advanced by the Employer in support of its position all pertain to the Federation of Special Police and Law Enforcement Officers (hereinafter Federation), with which the Petitioner is affiliated. The Employer claims that an official of the Federation stated to employees of another employer, "You will probably hear we are Mafia. But if we make a dollar and you make a dollar, who cares?" It further asserts that the President of the Federation is presently under investigation by the United States Justice Department's Organized Crime Strike Force regarding his activities with the Federation. In support of these two assertions, the Employer presented only magazine and newspaper articles containing unattributed and unsubstantiated reports that an investigation was being conducted and that the statement had allegedly been made. The Employer also asserts that the Federation is under investigation by the United States Attorney concerning alleged forgeries of Federation authorization cards in a representation proceeding. In support of this contention, the Employer presented a letter to it from the Board's Region 2 office indicating that a representation matter has been forwarded to the United States Attorney concerning possible forgeries of union authorization cards. Finally, the Employer asserts that the Federation recently called for an illegal strike of guards which it claims to

represent at the Indian Point Nuclear Power Plant, in Buchanan, New York. In support of this assertion, the Employer submitted a newspaper article indicating that a strike had occurred at the Plant.

Obviously, the mere fact that a Union or its officials have been accused of misconduct, or that allegations against them are being investigated, does not establish that the allegations are true or that Union officials have engaged in the alleged conduct. But even if misconduct were disclosed by an investigation, it would not warrant withholding certification. The Board has consistently declined to interpret the Act as barring the certification of a labor organization based upon reputed ties to organized crime, or even the prior criminal conviction of an officer of the union. *Alto Plastics Manufacturing Company*, 136 NLRB 850; *Whittlesea Checker Taxi, Inc.*, 237 NLRB 1038, *Carroll Contracting and Ready Mix, Inc.*, 247 NLRB 890. In *Alto Plastics Manufacturing Company, supra* at 851, the Board stated:

> [I]t must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a "good" labor organization, a "bad" labor organization, or no longer organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative.

As neither the allegation of ties to organized crime nor the investigation of a union official by a law enforcement agency is a proper basis for refusing to certify Local 1, I find that Supplementary Objection 5 lacks merit.

Supplementary Objection No. 6

In this Objection, the Employer contends that the Petitioner is not a *bona fide* labor organization wihtin the definition of Section 2(5) of the National Labor Relations Act because of "its amorphous and changing structure, vague as to membership participation." In support of this Objection, the Enployer presented excerpts of testimony by Herman Jaffe, a business representative for the Petitioner, in a 1978 hearing in *Wells Fargo Guard Services, Division of Baker Protection Services, Inc.*, Case No. 4–RC–13051. Jaffe was testifying on behalf of the Federation concerning the issue of whether is was it was affiliated indirectly with a non-guard union. While the Board in that case did note inconsistencies and contradictions in Jaffe's testimony, it nonetheless held that the Federation was not disqualified from being certified. *Wells Fargo Guard Services, Division of Baker Protective Service, Inc.*, 236 NLRB 1196.[5] The constitution and by-laws of the Federation were filed with the Labor Management Services Administration in 1976, and they have not been substantially changed since that time. The investigation disclosed that the Petitioner has at least four collective bargaining agreements with the employers, and that the Federation has numerous other contracts with employers. Accordingly, I find that the Employer's Supplementary Objection No. 6 lacks merits.

Supplementary Objection No. 7

In this Objection, the Employer contends that the Petitioner should be disqualified from representing security guards at a nuclear power plant under the United States Department of Energy's Security Policies and Practices Relating To Labor Management Relations because the Petitioner has in the past threatened strikes at nuclear facilities. In support of this Objection, the Employer submitted copies of letters from the Petitioner's president to the Employer threatening unspecified "job action" unless the Employer desisted from alleged harassment of the Petitioner's supporters. This ambiguous statement, which did not result in any strike or other action does not in any way established that the Petitioner would not comply with the requirements of the Department of Energy. Accordingly, I find that Supplementary Objection 7 lacks merit.

Supplementary Objection No. 8 and Second Supplementary Objection No. 2

These Objections will be treated together as they allege that the Petitioner is disqualified from representing the employees in the unit herein because it is affiliated directly and indirectly with organizations that admit nonguards to membership. In support of its contention, the Employer asserts that the Petitioner has maintained offices in the same office building in Bridgeport, Connecticut as the International Brotherhood of Teamsters Local 1040. It presented evidence that a certified letter addressed to the Federation at the aforementioned address was signed for by an A.K. Sedlack on September 2, 1980 and asserts that A.K. Sedlack has been employed in a clerical position by Teamsters Local 1040 for approximately 5 years. The Emplyer additionally presented evidence that one Abe Ferreira is an official of the Petitioner and that in late February, 1980, he delivered handbills on behalf of Teamsters Local 1040 to a hospital in Bridgeport, Connecticut. Finally, the Employer presents portions of testimony from a hearing in *Bally's Park Place, Inc.*, Case No. 4–RC–14233, concerning conduct of officials of the Federation in conjunction with an official of an organization known as the Association of Public and Private Labor Employees (APPLE).

In *Wells Fargo Guard Services, Division of Baker Protection Services, Inc., supra*, the Board held that the Federation was not affiliated with a labor organization which admits to membership employees other than guards. In so doing, it specifically considered the involvement between the Federation and APPLE, and found that the Petitioner was not disqualified on that ground. In the same case the Board found that activities similar to those relied upon the Employer here, such as the sharing of an

[5] The Board's decisions in *Douglas Oil Company*, 197 NLRB 308 and *International Brotherhood of Service Station Operators of America a/k/a International Brotherhood Fessional Services*, 215 NLRB 811, relied upon by the Employer, are inopposite. In those cases the Board found the organization therein invovled not to be a *bona fide* collective bargaining representative in large part because it was being operated for the benefit of one individual, while the Petitioner herein does, in fact, negotiate meaningful collective bargaining agreements with employers concerning the wages, hours and working conditions of employees.

office and an isolated incident of picketing assistance, not unlike the handbiling assistance, alleged herein. The fact that the Petitioner and Teamsters Local 1040 may additionally share in employing the services of clerical employees would not warrant a different result. Accordingly, I find that the Employer's Supplemental Objection No. 2 lacks merit.[6] [Footnote omitted.]

Second Supplementary Objections Nos. 3 and 4

In these Objections, the Employer asserts that the Petitioner is disqualified from certification because of misuse of Board processes. Specially, it relies upon an affidavit given by the President of Centurion Armored Service, Inc. in connection with the investigation of Cases Nos. 4-CA-9815 and 4-CA-9912 in which there was testimony that he never agreed to a 24 page collective bargaining agreement which he asserted a representative of the Federation attached to a recognition agreement which he had signed. The other evidence relied upon by the Employer is testimony from the hearing in *Bally's Park Place, Inc.*, 4-RC-14233 that Daniel Cunningham, President of the Federation and Herman Jaffe threatened to break the legs of an employer official if he didn't sign a contract with them.

No disposition has ever been made with respect to the contention of Centurion as those charges were withdrawn after Centurion resolved its dispute with the Federation. With respect to the claim that representatives of the Petitioner may have threatened physical violence to an employer, this conduct would not, without more, disqualify the Petitioner from being certified as the collective bargaining representative of the employees herein. See *Alto Plastics Manufacturing Corporation, supra.* Accordingly, I find that the Employer's Supplementary Objections Nos. 3 and 4 lack merit.[7]

[7] The remaining "sordid" history of the Federation and Centurion referred to in Second Supplementary Objection No. 3 consists of two union deauthorization petitions which were withdrawn and the unfair labor practice charge against Centurion in Case No. 4-CA-11379 in which the Federation alleged that Centurion had discharged guards because of their support of the Federation and which the Federation subsequently withdrew with no determination having been made by the Region on the merits.